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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

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No. 75-1182

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THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Petitioner

v.

ROBERT FRANCIS, et al., Respondents

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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# BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the district court and court of appeals were correct in holding 45 C.F.R. §233.100(a)(1)(ii), which defines eligibility for welfare benefits for children of unemployed fathers, to be violative of the requirements of 42 U.S.C. §607(a) and therefore invalid.

## REASONS FOR DENYING THE WRIT

The issue in this case (Francis II) is very narrow. The district court's refusal (App. 79a) to dissolve the injunction issued in 1972 in Francis I (App. 2a) was affirmed by the Fourth Circuit (App. 103a). The Chamber now seeks review of these decisions. It has failed, however, to show a conflict of decisions or an important question of federal law properly raised by this

case. It is indeed most doubtful that the Chamber's labor law issue is properly a part of this second Francis case.

A. The Chamber's Labor Law Preemption Issue Is Not Properly a Part of Francis II

1. This issue became final in Francis I

In Francis I the district court resolved adversely to the Chamber its issue that the payment of AFDC-UF benefits to the children of strikers conflicts with national labor policy (App. 20a). The court also found that paying AFDC-UF benefits to these children was not precluded by the purposes or the language of the Social Security Act (App. 24a-29a). When the district court decision was summarily affirmed by this Court, 409 U.S. 904, the holdings of the district court became the final law of this case.

The motion to the district court to dissolve the injunction entered in Francis I was based entirely on H.E.W.'s change in regulations. Because the sole question raised on the motion to dissolve was whether events subsequent to the issuance of the injunction required its dissolution, see Fed. R. Civ. P. 60(b)(5), the NLRA preemption issue could not have been and indeed was not again injected into this case. The motion did not reopen other nonrelated issues finally decided in the case.

2. There is no evidence in the record relating to the preemption issue.

The issue of conflict with national labor policy was first raised by the Chamber in its motion to intervene in Francis I. Various facts were proffered to the district court to support its position. The court assumed the validity of these facts arguendo but then rejected the argument. Because these facts were never entered into evidence, respondent had no opportunity to rebut them. Consequently, there is no evidence in the record to support the Chamber's position on this issue. Without a factual basis to rely upon, this Court would be extremely ill-equipped to deal with the very expansive issues sought to be raised by the Chamber.

-3- B. There Is No Conflict of Decisions

The Chamber has not cited any decision of this Court in conflict with Francis II. The two cases it cites as "contrary rulings" do not address the issues raised in this case. Both involve the AFDC program of 42 U.S.C. §606, as opposed to the AFDC-UF program of 42 U.S.C. §607, and neither concerns the question of granting or denying benefits on the basis of national labor policy.

C. There Is No Important Question of Federal Law

1. The impact of this decision is minimal on a national scale

The district court in Francis I noted that there were twenty-two states besides Maryland with AFDC-UF programs. Of these states, one gave no benefits to the children of strikers, two denied benefits to children of strikers unless their involvement was due to a lockout, and two denied benefits to children of strikers unless they were involved in a "legal" strike (App. 19a n.22). Thus only five states besides Maryland deny benefits to children of any or all economic strikers.

2. The H.E.W. regulation at issue in this case is likely to be amended in the near future

There is substantial likelihood that the HEW regulation involved in this case will be changed in the near future. The Fourth Circuit acknowledged this possibility in its opinion (App. 103a n.1). Proposed new regulations have already been published by HEW (App. 121a-124a). A similar situation developed when the district court's decision in Francis I was on appeal to this Court. At that time, the Solicitor General informed the Court that the Secretary was in the process of amending the HEW regulations. The Solicitor General therefore recommended that "[i]n these circumstances, this case does not warrant plenary review by this Court." (App. 60a). The Court summarily affirmed the district court decision.

It is again quite probable that any decision by this Court would be quickly mooted by a change in the regulation. Accordingly, plenary review is

unwise at this time. Compare Richardson v. Wright, 405 U.S. 208 (1972); White v. Regester, 422 U.S. 935 (1975).

D. The Decision Below is Clearly Correct

1. Because he failed to promulgate a federal definition of unemployment, the Secretary's regulation is invalid

It is quite clear that Congress intended that the Secretary would promulgate a standard nation-wide definition of "unemployment." Under the original AFDC-UF enactment, Pub. L. 87-31, §407, 75 Stat. 75 (1961), the definition of an "unemployed parent" was left to each participating state. Finding that this led to "wide variations in the definitions used by the states,"[1/] Congress amended the Act in 1967 to provide that "the definition of unemployment would be made by the Federal Government."[2/] Thus, in order to attain "a uniform definition of unemployment throughout the United States,"[3/] Congress amended the Act to grant a child's father benefits if he was "unemployed (as defined by the Secretary) . . ."[4/]

Rather than prescribing uniform standards for defining unemployment, however, the Secretary promulgated a regulation that declared that a state's definition of unemployment

> need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the state's unemployment compensation law.

45 C.F.R. §233.100(a)(1).

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1/ See, e.g., H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967), quoted in Francis I, see App. 46a.

2/ See, e.g., H.R. Rep. No. 544, 90th Cong., 1st Sess. at 17, quoted in Francis II, see App. 85a.

3/ Report of U.S. Senate Comm. on Finance, Social Security Amendments of 1967 at 4 (Nov. 14, 1967).

4/ H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967). The amended section of the statute (42 U.S.C. §607(a)) is set out at App. 127a.

This definition leaves each participating state with at least eight different options as to which of its unemployed fathers can receive AFDC-UF benefits for their children. By delegating these options to the states, the Secretary acted contrary to Congressional intent and the language of the statute.

The Francis II courts found that the Secretary's regulation had failed to set national standards for defining unemployment (App. 85a). It therefore correctly ruled the HEW regulation invalid and refused to modify its prior injunction.

2. Congress did not intend to disqualify children of fathers unemployed due to a labor dispute from AFDC-UF benefits

a. Legislative history of the Social Security Act

When the 1961 AFDC-UF legislation was being debated, Congressman Mills, the legislation's spokesman, explicitly stated that states could grant stikers AFDC-UF benefits if they chose to do so. See 107 Cong. Rec. 3526 (Mar. 10, 1961). No one contested this statement. Furthermore, Congress has several times defeated legislative efforts to specifically amend the AFDC-UF program to exclude strikers' coverage. See Chamber's Petition at 13-14, n.13 for a listing of these efforts.

As the district court pointed out in Francis I, the final legislative intent was not clearly shown by legislative debate (App. 23a n.25). However, the Act on its face covers the children of "unemployed" fathers. Respondents' class are unemployed and out of work. In such a situation,

> a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional.

Burns v. Alcala, 420 U.S. 575, 580 (1975). No such clear indication can be shown. Accordingly, respondents are entitled to the Act's coverage.

-6-

b. National labor policy does not preclude payment of AFDC-UF benefits to children of fathers unemployed due to a labor dispute

The Chamber has cited to this Court no case which supports its proposition that the National Labor Relations Act preempts federal welfare policy in such a way as to preclude Congress or the Secretary from paying the needy children of fathers out of work due to a labor dispute subsistence welfare benefits, such as AFDC-UF. The Chamber's reliance on dicta from Super Tire Engine Co. v. McCorkle, 416 U.S. 115 (1974), is surely misplaced. The issue in Super Tire was mootness; the Court never reached the merits.

The Francis I court rejected the Chamber's assertions of preemption with a reference to the First Circuit's decision in ITT Lamp Div. v. Minter, 435 F.2d 989 (1st Cir.), cert. denied, 402 U.S. 933, pet. for reh. denied 404 U.S. 874 (1971). The ITT opinion held that the N.L.R.A. did not preclude Massachusetts from making welfare benefits available to strikers. The court in ITT stated that the proper forum for this controversy is the Congress. 435 F.2d at 993-994. In Francis II, the Fourth Circuit agreed (App. 103a). Because the Chamber has made no record on this question, it seems doubly improper for the Court to consider this broad question in the context of this case.

## CONCLUSION

For any or all of the foregoing reasons, the Chamber's petition should be denied.

Respectfully submitted,

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*/ Counsel appreciates and acknowledges the major contribution to this Brief of Jo Tobias, third-year law student, University of Maryland School of Law.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April 1976, I mailed postage prepaid, copies of the foregoing Brief for Respondents in Opposition to Gerard C. Smetana, attorney for the Chamber of Commerce, and Joel Rabin, attorney for the State of Maryland.

C. Christopher Brown

Attorney for Respondents